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5-11-1982

## State of New York Public Employment Relations Board Decisions from May 11, 1982

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from May 11, 1982

### Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2A-5/11/82  
BOARD OF EDUCATION OF THE CITY SCHOOL :  
DISTRICT OF THE CITY OF NEW YORK, : BOARD DECISION  
: AND ORDER  
Employer, :

-and- :  
ATTENDANCE TEACHERS ORGANIZING COMMITTEE, : CASE NO. C-2002  
Petitioner, :  
-and- :  
UNITED FEDERATION OF TEACHERS, LOCAL 2, :  
AFT, AFL-CIO, :  
Intervenor. :

In the Matter of :  
BOARD OF EDUCATION OF THE CITY SCHOOL :  
DISTRICT OF THE CITY OF NEW YORK and :  
UNITED FEDERATION OF TEACHERS, LOCAL 2, :  
AFT, AFL-CIO, :  
Respondents, : CASE NO. U-4567  
-and- :  
ATTENDANCE TEACHERS ORGANIZING COMMITTEE, :  
Charging Party. :

In the Matter of :  
BOARD OF EDUCATION OF THE CITY SCHOOL :  
DISTRICT OF THE CITY OF NEW YORK, :  
Respondent, : CASE NO. U-5186  
-and- :  
ATTENDANCE TEACHERS ORGANIZING COMMITTEE, :  
NEA/NYC, :  
Charging Party. :

In the Matter

BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK AND  
UNITED FEDERATION OF TEACHERS,

Respondents,

CASE NO. U-5230

-and-

RICHARD RHODES BEHRENS,

Charging Party.

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT  
OF THE CITY OF NEW YORK,

Respondent,

CASE NO. U-5616

-and-

ATTENDANCE TEACHERS ORGANIZING COMMITTEE,

Charging Party.

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT  
OF THE CITY OF NEW YORK,

Respondent,

CASE NO. U-5626

-and-

RICHARD RHODES BEHRENS,

Charging Party.

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT  
OF THE CITY OF NEW YORK,

Respondent,

CASE NO. U-5780

-and-

MARVIN DATZ,

Charging Party.

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In the Matter of :

BOARD OF EDUCATION OF THE CITY SCHOOL :  
DISTRICT OF THE CITY OF NEW YORK, :

Respondent, :

CASE NO. U-5804

-and- :

~~ATTENDANCE TEACHERS ORGANIZING COMMITTEE~~ :  
and MARVIN DATZ, :

Charging Parties. :

JACK SCHLOSS, ESQ., for the New York  
City Board of Education

JAMES R. SANDNER, ESQ., for United  
Federation of Teachers, Local 2,  
AFT, AFL-CIO

KENNETH M. AGELOFF, ESQ. and MARVIN  
DATZ, on behalf of Petitioner/Charging  
Parties

This matter comes to us on the exceptions filed to the  
decisions in the following cases:

1. The decisions of the hearing officer in Case Nos.  
U-5230, U-5626 and U-5780.

2. The decisions of the Director of Public Employment  
Practices and Representation (Director) in Case Nos. U-5186,  
U-5616 and U-5804.

3. The special report and recommendation made by the  
Deputy Chairman, serving as hearing officer, in Case Nos. C-2002  
and U-4567.

The proceedings have been consolidated for disposition because the parties in interest or their representatives are the same in all cases and the basis for our decision is the same in all cases.

Having considered the exceptions, we are dismissing all the proceedings. The conduct of the parties filing these exceptions, as hereinafter set forth, evidences a pattern of defiant attempts to ignore the procedures of this Board and to disrupt and abuse its processes. They have been put on notice that we will not permit them "to impose a new procedure on this Board which is not consistent with its Rules, 1/"

Case Nos. U-5230, 5626, and 5780

In these three cases, the exceptions are to the hearing officer's decisions which dismissed improper practice charges for failure to appear at scheduled conferences.

In Case No. U-5230, an improper practice charge was filed by Richard Rhodes Behrens on February 18, 1981, against the Board of Education of the City School District of the City of New York (hereinafter District) and the United Federation of Teachers (hereinafter UFT). The charging party selected Marvin Datz as his representative in this proceeding. After adjourning several conferences at the request of the charging party, the hearing officer scheduled a conference for September 9, 1981, by letter dated August 6, 1981. On September 8, 1981, Datz telephoned

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1/ Bd. of Ed. of the City School District of the City of New York (Behrens), 14 PERB ¶3034, at p. 3057 (April 1981), motion for reconsideration denied, 14 PERB ¶3041 (May 1981)

Board - C-2002; U-4567; U-5186; U-5230;  
U-5616; U-5626; U-5780; U-5804

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PERB's New York City Regional Office and informed the secretary that the charging party had been ordered by the District to appear at its offices at 8:30 a.m. on September 9, 1981, the date for which the conference had been scheduled. He told the secretary that neither he nor the charging party would appear for the conference. Datz confirmed this message by letter dated September 8, 1981, in which he stated that Behrens had been "directed to report to the District's offices" and that said "direct order can not be refused since one would become subject to the charge of insubordination."

When the hearing officer contacted the District to verify the basis for Behrens' claimed inability to attend the conference, the District's representative disclaimed any knowledge of such order and pointed out to the hearing officer the unlikelihood of any such order being given since Behrens had been terminated from the District's employ two years previously. The hearing officer therefore wrote to Behrens and Datz, directing that the specifics be provided with respect to the claim that Behrens had been ordered to appear at the District's offices. By letter dated September 13, 1981, Behrens informed the hearing officer that he had decided to go to the District's offices because he had heard of "openings" for jobs.

The hearing officer issued a decision on September 28, 1981, dismissing the charge on the bases that the charging party had chosen voluntarily to absent himself from the conference on

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U-5616; U-5626; U-5780; U-5804

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September 9, 1981, and his chosen representative had misrepresented the reason that he would be absent in order to obtain an adjournment.

In Case No. U-5626, Behrens filed an improper practice charge against the District on August 27, 1981. Without prior notice or subsequent explanation, neither he nor Datz, his representative, appeared at the scheduled pre-hearing conference on October 2, 1981, at which the hearing officer and the District's representative were present. The hearing officer issued a decision on October 13, 1981, dismissing the charge for failure to prosecute.

In Case No. U-5780, Datz filed an improper practice charge against the District on November 24, 1981. By notice dated December 7, 1981, a pre-hearing conference was scheduled to be held in New York City on January 7, 1982. By letter dated December 20, 1981, Datz requested the hearing officer to direct the District to release him from work so that he could attend the conference without loss of pay. The hearing officer denied the request by letter dated December 23, 1981, and informed Datz that he or a designated representative would be expected to attend the scheduled conference unless previously adjourned by the hearing officer. Datz responded by letter dated December 28, 1981, requesting that the conference be scheduled for a time when school was not in session or that the District be ordered to release him from work. Datz did not appear at the conference, at which the hearing officer and the District's representative were present.

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U-5616; U-5626; U-5780; U-5804

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Upon his arrival in New York City from Albany on the morning of January 7, 1982, the hearing officer was informed by the secretary in PERB's New York City office that Datz had telephoned that morning, stating that he would not attend the conference because he was ill and that he would forward proof of illness.

By letter dated January 11, 1982, the hearing officer instructed Datz to submit a physician's statement setting forth the nature and severity of the illness. Datz was also instructed to provide justification for his failure to notify the hearing officer prior to the conference date that he would not be able to attend because of illness. Datz sent the hearing officer a statement from his doctor indicating that he had been confined to bed as of January 4, 1982. The hearing officer wrote to Datz on January 13, 15 and 18, 1982, informing Datz that he expected an explanation concerning why Datz had not notified him prior to the date of the conference that he would be unable to attend and that absent a satisfactory explanation, the improper practice charge would be dismissed. By letter dated January 21, 1982, Datz enclosed an additional doctor's note, stating that Datz had been confined to his home on January 4, 5, 6 and 7, 1982. No explanation was offered concerning why Datz did not notify the hearing officer prior to the date of the conference that he would be unable to attend.

Primarily because no explanation was offered concerning why Datz did not notify him before the scheduled date of the conference

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U-5616; U-5626; U-5780; U-5804

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that he would not be able to attend, the hearing officer issued a decision on January 26, 1982, dismissing the charge. In his decision, the hearing officer pointed out that Datz had been informed previously that all hearing officers are based in Albany and travel to New York City to attend conferences and that such notice is necessary to prevent an unwarranted trip by the hearing officer as well as inconvenience to the respondent's representative.

Case Nos. U-5186, 5616 and 5804

In these three cases, the exceptions are to decisions of the Director which dismissed improper practice charges for failure to correct deficiencies.

In Case No. U-5186, the Attendance Teachers Organizing Committee (ATOC), with Datz as its representative, filed an improper practice charge against the District on January 27, 1981. By letter dated February 5, 1981, the Director notified Datz of the deficiencies in the charge and requested clarification. After several adjournments at the request of the charging party, a conference was held on July 29, 1981, at which the assigned hearing officer agreed to submit to the charging party's representative a letter setting forth the deficiencies in greater detail. This was done by letter dated August 25, 1981. This letter requested a response by September 1, 1981. Thereafter, in response to a telephone request by the charging party, the date

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for submission of a response was extended until September 15, 1981. By letter dated September 21, 1981, Datz wrote to PERB's Chairman, protesting the manner in which the charge was being processed and requesting the removal of the assigned hearing officer. In that letter, he stated that the response that had been directed would not be provided pending the Chairman's review. On September 30, 1981, the Director issued a decision dismissing the charge because of the charging party's failure to cooperate in its processing.

In Case No. U-5616, ATOC, with Datz as its representative, filed an improper practice charge against the District on August 17, 1981. Because the charge appeared to be deficient on its face, the Director, by letters dated August 25 and September 14, 1981, notified Datz of the deficiencies and directed him to respond by September 28, 1981. There being no response, the Director issued a decision on September 30, 1981, dismissing the charge because of the deficiencies.

In Case No. U-5804, ATOC and Datz filed an improper practice charge against the District on December 10, 1981. By letter dated December 30, 1981, the assigned hearing officer notified Datz, who represented ATOC and himself, that the charge was deficient and might be dismissed if not corrected. The letter informed Datz of the telephone number at which the hearing officer could be contacted. Datz responded by letter dated January 2, 1982, complaining of the delay in processing the charge and questioning the

Board - C-2002; U-4567; U-5186; U-5230;  
U-5616; U-5626; U-5780; U-5804

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propriety of the assignment of the hearing officer. The letter did not address the deficiency question. The Director responded, by letter dated January 6, 1982, that the notification of deficiency was sent at his direction. The hearing officer, by letter dated January 13, 1982, notified Datz that unless Datz contacted him by January 19, 1982, to discuss the deficiency, the charge would be dismissed. Datz responded by letter dated January 15, 1982, objecting again to the delay in processing the charge and stating that he had not "heard any mention of deficiencies" from the Director. On January 22, 1982, the Director issued a decision dismissing the charge for failure to prosecute.

Case Nos. C-2002 and U-4567

In these two cases, the exceptions are to the report and recommendations of the Deputy Chairman, which recommends that the cases be decided against ATOC because of Datz's failure to appear at a hearing for cross examination.

Case Nos. C-2002 and U-4567 are a combined proceeding involving objections by ATOC to conduct affecting the results of an election and improper practice charges filed by ATOC alleging improper conduct by the employer and the United Federation of Teachers during the election campaign. After a hearing was held, by separate decisions dated July 25, 1980, the Director dismissed the certification petition and the hearing officer dismissed the improper practice charges.<sup>2/</sup> After several extensions of time, the

2/ 13 PERB ¶4043; 13 PERB ¶4584.

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exceptions were filed on September 16, 1980. Upon considering the exceptions, we issued a decision on January 6, 1981, directing that a further hearing be conducted. We assigned our Deputy Chairman to conduct the hearing.

To suit the convenience of ATOC, a hearing was not held until April 22, 1981. On that date, the direct and cross-examination of a witness adverse to the interests of ATOC was completed. The direct and partial cross-examination of Datz, a primary spokesman for ATOC, was also completed. In order to complete the cross-examination of Datz, it was necessary for Datz to supply the UFT's attorney with certain documents about which Datz had testified. Datz stated that he would not have the time to gather the materials until after the close of school but would send them to UFT's attorney in early July. He sent them in September. By letter dated September 25, 1981, a hearing was scheduled for Friday, November 27, 1981, the day following Thanksgiving. This was done to convenience Datz so that he would not have to attend the hearing on a day when school was in session and thereby lose a day's pay. When the hearing officer arrived in PERB's New York City office on the morning of the hearing, he was informed that Datz had telephoned that morning to say that he was ill and could not attend the hearing. ATOC's attorney, who was present for the hearing, as were the representatives of the other parties, stated that Datz had called his office sometime the previous day and left a message on his recording machine that he was ill. When asked to proceed with his case, ATOC's attorney stated that he had nothing to present other than Datz's testimony. A motion was

made by UFT, joined in by the employer, to strike Datz's testimony for failure to appear to be cross-examined. The employer made an additional motion to dismiss the petition and charge for failure to prosecute. The hearing officer advised the parties that the motion would not be ruled on until ATOC submitted whatever materials it wished to submit to support Datz's claim of illness. After the materials were submitted, we considered the motions. Because their disposition required credibility determinations, on January 11, 1982, we directed the hearing officer to submit a report and recommendations to which the parties could file exceptions.

On January 12, 1982, the hearing officer issued his report and recommendations. For the reasons set forth therein, with which we agree, he found Datz's evidence of his inability to attend the hearing due to illness to be unpersuasive. He therefore recommended that Datz's testimony be stricken because of his failure to appear for cross-examination and that the case be decided against ATOC on the basis of the uncontroverted testimony adverse to it.

ORDER

For the reasons set forth at the beginning of this decision we will not consider the exceptions and will proceed no further in these matters.

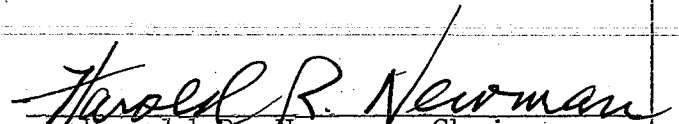
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U-5616; U-5626; U-5780; U-5804


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NOW, THEREFORE, WE ORDER that the proceedings in Case Nos.  
C-2002, U-4567, U-5186, U-5230, U-5616, U-5626, U-5780 and U-5804  
be, and they hereby are, dismissed.

Dated, Albany, New York  
May 10, 1982

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

\_\_\_\_\_ : #2B-5/11/82  
In the Matter of  
VILLAGE OF GENESEO, :  
Respondent, : BOARD DECISION AND ORDER  
-and- :  
GENESEO POLICE ASSOCIATION, :  
COUNCIL 82, AFSCME, AFL-CIO, : CASE NO. U-5203  
Charging Party. :  
\_\_\_\_\_ :

JOHN P. MAC ARTHUR, Esq., for Respondent

CHRISTOPHER H. GARDENER, for Charging Party

The Village of Geneseo (Village) has filed exceptions to the hearing officer's decision that the actions of the Village, in creating and filling the position of Deputy Chief, constituted an improper practice in violation of Civil Service Law §209-a.1(a), (c), and (d) as claimed by the Geneseo Police Association, Council 82, AFSCME, AFL-CIO (Association). In support of its exceptions, the Village argues, in summary, that the hearing officer made a unit determination in an improper practice rather than a representation proceeding, erred in reaching conclusions of fact by placing an undue burden of proof upon the Village, and further, that the recommended remedy is inappropriate.

In March of 1976, the union was given recognition with respect to all police officers of the Village. At that time, the title of Sergeant was considered to be part of the bargaining



unit. In July of 1976, the Village abolished the position of Sergeant following the death of the incumbent. In January of 1977, the first collective bargaining agreement was achieved. The Village police force consists of four full-time and four part-time patrolmen.

In February 1980, Patrolman Guarino, the most senior police officer on the force, performed the duties of the Chief during the latter's absence. He applied, pursuant to the contract, for out-of-title pay. Before receiving the out-of-title pay, he learned from the Chief that the Board of Trustees was displeased because of Guarino's application for the out-of-title pay.

During the Summer of 1980, the Chief requested that the Village create a position to assist him, suggesting first the title of Sergeant. Guarino would have been eligible for appointment to the title of Sergeant and under the promotion provisions of the contract, would have been entitled to the position. The Village instead created the position of Deputy Chief explaining that they were looking for a non-unit position. The qualifications for the new position as finally set by the County Civil Service Commission required two years of supervisory experience. No bargaining unit employee meets the supervisory experience qualifications. A Village trustee and member of its Police Committee, in justifying the effort to create the Deputy Chief position, made negative comments concerning Guarino's union activism. Guarino's lack of supervisory experience precluded his being considered.

The essence of the Association's improper practice charge is that the intended non-unit position was created to interfere with current and future employees in the unit and for the purpose of discouraging their union participation. It also specified that the employer refused its demand to negotiate terms and conditions of employment for the newly created position. This has been admitted by the Village.

The hearing officer has drawn the inference that the creation of the position of Deputy Chief was to impede Guarino's appointment because of the exercise of his rights under the contract, i.e., insisting on out-of-title pay. The employer's action was found to constitute a violation of CSL §209-a.1(a) and (c).

We affirm these findings of fact and conclusions of law reached by the hearing officer. The record amply supports the conclusions that the attempt to create a non-unit position interfered with the employees' Taylor Law rights and was an unlawful discriminatory and coercive practice. Half Hollow Hills Community Library, 6 PERB ¶3043 (1973).

The Village's argument that the hearing officer placed upon it an improper burden of proof is not persuasive. There is no question but that a charging party has the burden to prove its claim. However, a mere denial or an assertion challenging the proof adduced by charging party may not be sufficient to rebut the proof adduced. Drawing conclusions adverse to respondent from the evidence which it failed adequately to rebut is not equivalent to a shifting of the burden of proof.

Notwithstanding our affirmance of the hearing officer's findings that the Village has improperly interfered and engaged in discriminatory action, we find merit in part of the Village's exception that the remedy recommended by the hearing officer will not promote the policies of the Act. Part of the recommended order would direct the Village to pay Guarino the salary and all other benefits accruing to the position of Deputy Police Chief "until such time as he is eligible and considered for appointment to said position or its equivalent". As previously noted, the Civil Service qualification for the position of Deputy Police Chief requires two years of supervisory experience. Outside of the Chief and the new Deputy Police Chief, there are no supervisory positions in the Geneseo Police Department. Thus, Guarino does not have the opportunity to gain the requisite supervisory experience within the department and hence could never qualify under these circumstances for consideration for appointment to the Deputy Chief position. The recommended order therefore has the effect of providing Guarino with the emoluments of a higher level position for which he would never need to qualify or even try to qualify. Because this aspect of the recommended order is not reasonably related to effectuating the policies of the Act, we find it to be punitive rather than remedial in nature. We conclude that the policies of the Act will best be promoted by directing the Village to pay Guarino the salary and benefits of the new position until such time as this Board, in an appropriate proceeding, makes a determination as to the proper unit placement of the new position. Thereafter,

Guarino's rights would be affected by the results of the unit placement determination.

The hearing officer also found a violation of CSL §209-a.1(d) premised upon the finding that the duties of the new Deputy Chief position were those performed in 1976 by the incumbent of the Sergeant's position and that the employer has attempted to transfer unit work to non-unit personnel without negotiations.

In view of our finding that the Village has violated CSL §209-a.1(a) and (c) and in light of the nature of the remedy we have prescribed in that part of our order dealing with unit placement, we dismiss the charge insofar as it relates to the alleged violation of CSL §209-a.1(d) and find it unnecessary to address that aspect of the charge as well as the Village's argument that the hearing officer has made a unit determination in the context of an improper practice proceeding.

NOW, THEREFORE, WE ORDER THAT:

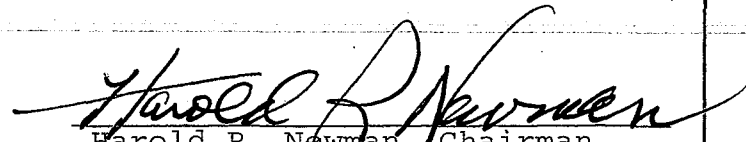
1. So much of the charge as alleges a violation of CSL §209-a.1(d) be, and the same is, hereby dismissed; and


WE FURTHER ORDER THAT the Village of Geneseo:

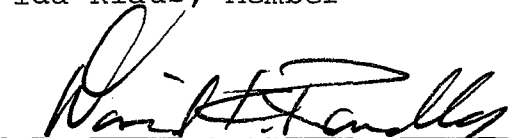
2. Pay Joseph Guarino the salary and all other benefits accruing to the position of Deputy Police Chief since the filling of that position and until such time as the unit placement status of the position of Deputy Police Chief is determined by this Board;
3. Not discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization;
4. Not interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in Section 202 of the Act for the purpose of depriving them of such rights; and

5. Conspicuously post the attached notice at all work locations in places normally used to communicate with unit employees.

DATED: May 11, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

## NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

### NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees that the Village of Geneseo

1. Will pay Joseph Guarino the salary and all other benefits accruing to the position of Deputy Police Chief since the filling of that position and until such time as the unit placement status of the position of Deputy Police Chief is determined by this Board;
2. Will not discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization; and
3. Will not interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in Section 202 of the Act for the purpose of depriving them of such rights.

Village of Geneseo

Dated .....

By .....  
(Representative) (Title)

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

F 7504

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2C-5/11/82  
CITY OF POUGHKEEPSIE, :  
Respondent, : BOARD DECISION AND ORDER  
-and- :  
CITY OF POUGHKEEPSIE UNIT OF THE :  
DUTCHESS COUNTY LOCAL OF CSEA, : CASE NO. U-4458  
Charging Party. :

RICHARD I. CANTOR, ESQ., for Respondent

ROEMER AND FEATHERSTONHAUGH, ESQS. (RICHARD  
BURSTEIN, ESQ.), for Charging Party

This matter comes to us on the exceptions of the City of Poughkeepsie (City) to a hearing officer's decision that it violated §209-a.1(d) of the Taylor Law by subcontracting its parking and waste water treatment services to private contractors without negotiating its decision to do so with City of Poughkeepsie Unit of the Dutchess County Local of CSEA (CSEA).<sup>1/</sup>

FACTS

In early 1979, the City began to investigate the possibility of subcontracting some of its services. This came to the attention of CSEA which, by letter dated August 16, 1979, demanded that the City negotiate the issue. The City agreed in a letter dated August 24, 1979, and, after some difficulty in scheduling a meeting, the parties met on November 9, 1979, to discuss sub-

<sup>1/</sup> The matter came to us previously on the exceptions of CSEA to a decision of the hearing officer dismissing the charge on the ground that CSEA failed to prosecute. We remanded it to the hearing officer. 13 PERB ¶3091 (1980).

contracting.<sup>2/</sup> At that time, CSEA made several proposals for alternatives to the City's plan.

CSEA was notified by the City on November 21, 1979, that subcontracting had been on the Common Council's agenda the night before and had been referred to committee. CSEA representatives then appeared at meetings of the Common Council's Finance Committee that night, and at a meeting of the entire Common Council on December 5, 1979. The meetings were open to the public, with the CSEA representatives voicing their objections and making their proposals from an open microphone. There were no counter-proposals by the City's representatives although the City indicated it would "consider" CSEA's proposals. On December 11, 1979, the Common Council voted to subcontract the operation of the City's parking and waste water treatment services.

When the City subcontracted its waste water and parking services on December 11, 1979, it and CSEA were parties to a collective bargaining agreement covering the 1979-80 calendar years which had been signed on September 14, 1979. There was no actual discussion of subcontracting during the course of the contract negotiations, but a preexisting management rights clause was relevant. Section 1 of the clause states:

"the City retains the right . . . to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this agreement . . . ."

Section 2 of the management rights clause contains a limitation on Section 1. It provides:

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<sup>2/</sup> During the interim, the City wrote CSEA other letters in which it confirmed its willingness to negotiate the matter.



"All rights of the CITY under this Agreement are subject to such regulations governing the exercise of said rights as . . . provided in Article 14 of the Civil Service Law . . . . "

On recall as a witness, the CSEA negotiator, Philip Miller, testified that Section 2 meant that the City's rights under Section 1 were limited by its duty to negotiate under the Taylor Law. Thereafter, the City called the City Manager and the Mayor but they did not refute Miller's testimony.

The hearing officer determined that CSEA had not waived its right to negotiate the subject of subcontracting. Holding that the subcontracting of the waste water and parking services was a mandatory subject of negotiation, she rejected the City's argument that it had satisfied its duty to negotiate. To remedy the City's violation of its duty to negotiate in good faith, she ordered it to reinstate the employees who had lost their positions under their prior terms and conditions of employment and to make them whole for any losses of wages and benefits that they suffered.

#### DISCUSSION

The City's exceptions allege five errors by the hearing officer.

##### 1. Negotiability

The City argues that the hearing officer should have ruled that the subcontracting of the waste water and parking services is a management prerogative over which it need not have negotiated.

In doing so, it attempts, without success, to distinguish Saratoga Springs, 11 PERB ¶3037 (1978), aff'd 68 AD 2d 202 (Third Dept., 1979), 12 PERB ¶7008, mot. for lv. to app. den. 47 NY 2d 711 (1979), 12 PERB ¶7012. This argument is rejected.

2. Waiver

The City next contends that the hearing officer should have found that the management rights clause authorized it to subcontract services previously performed by unit employees. According to the City, Section 1 of the clause gave it this right and Section 2 of the clause refers only to the statutory rights of employees to organize and to be represented by the organization of their choice.

The City's interpretation of the total management rights clause is inconsistent with the uncontradicted testimony of Miller that the clause was not intended to constitute a waiver of CSEA's right to negotiate mandatory subjects of negotiation. The City's conduct during the period between August 24, 1979, and November 26, 1979, indicates that it then had the same understanding as Miller of the meaning of the total management rights clause. Responding to CSEA's demand for negotiations, the City wrote to it on August 24 that it "is considering the contracting out of the operations of its parking facilities . . . [but that it] welcomes negotiations with CSEA on this issue." Again, on September 18, 1979, four days after the collective bargaining agreement was signed, the City wrote to CSEA to make arrangements for negotiations concerning the "proposed contracting out of the

operation of its parking facilities." On October 5, 1979, the City wrote to CSEA "[w]e shall proceed to meet to negotiate the question of parking facilities" and on October 19, 1979, it wrote "[t]he City has been and remains ready, willing and able to meet and negotiate with you on this matter." In other letters written by the City in October and November 1979 it reaffirmed its readiness to negotiate the subject of subcontracting, but on November 26, 1979, it asserted, for the first time, that the management rights clause authorized the City to act unilaterally in this matter. The uncontradicted testimony of Miller and the conduct of the City between August and November 1979 persuade us that the total management rights clause was not understood by the parties to preclude negotiations on the subject of subcontracting.<sup>3/</sup> We find no persuasive evidence of waiver and reject the contention of the City.

### 3. Satisfaction of Duty to Negotiate

The City maintains that its discussions with CSEA satisfied any obligation it may have had to negotiate. This position, too, is not persuasive. Most of the discussions that took place were part of the City's legislative process. Only the meeting of November 9, 1979, might constitute proper negotiations. They did not proceed far enough, however, to permit the City to take unilateral action. Section 209 of the Taylor Law contemplates intervention by the legislative body of the City to resolve a deadlock only after exhaustion of negotiation efforts and

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<sup>3/</sup> See Baldwinsville Central School District, 15 PERB ¶3032 (1982).

impasse procedures. Here the City Legislature usurped the role of the City's negotiators and unilaterally disposed of the issue in dispute before the negotiating process was exhausted.

4. Conduct of Hearing Officer

According to the City, the hearing officer erred in permitting CSEA to recall Miller as a witness concerning the interpretation of Section 2 of the management rights clause. We find that the hearing officer's ruling was a proper exercise of her discretion. The City was not prejudiced by the ruling. It was given an opportunity to produce its own witnesses to refute that testimony.

The City asserts further that the hearing officer misled it by her initial statement that she was inclined to dismiss the charge. It argues that, but for this statement, it might have produced additional witnesses who could have refuted the testimony of CSEA's witnesses. We find that the hearing officer's statement did not prejudice the City. She subsequently told it in unambiguous terms to proceed with its case or rest on the evidence before her, and the City did call two witnesses thereafter.

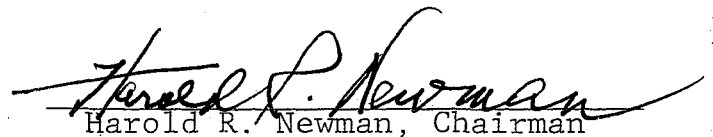
5. The Remedy

The City complains that the hearing officer's proposed remedy is ambiguous in that it does not deal with the relationship of the City to the subcontractors. As the issue has no relevance to the improper practice found, the hearing officer properly refrained from addressing it. She recommended the same remedy as that ordered by this Board in Saratoga Springs, supra, and approved by the courts.

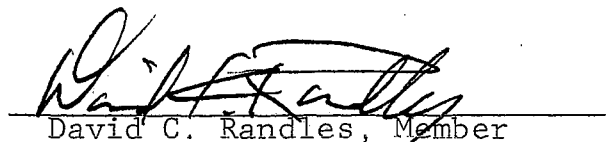
NOW, THEREFORE, WE ORDER the City of Poughkeepsie to:

1. Offer reinstatement under their prior terms and conditions of employment to those employees terminated as a result of the subcontracting of the parking facilities operation and the operation of the waste water treatment facility, together with any loss of wages or benefits that they may have suffered by reason of such agreement, and
2. Negotiate in good faith with CSEA concerning terms and conditions of employment, and
3. Post the attached notice in those locations normally used by the City to communicate with the employees in this unit.

DATED: May 11, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify our employees that:

1. The City will offer reinstatement under their prior terms and conditions of employment to those employees terminated as a result of the subcontracting of the parking facilities operation and the operation of the waste water treatment facility, together with any loss of wages or benefits that they may have suffered by reason of such agreement, and
2. The City will negotiate in good faith with CSEA concerning terms and conditions of employment.

City of Poughkeepsie

Dated .....

By .....  
(Representative) (Title)

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

7512

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2D-5/11/82
CITY OF NORTH TONAWANDA HOUSING AUTHORITY,	:	<u>BOARD DECISION</u>
Respondent,	:	<u>AND ORDER</u>
-and-	:	
AFSCME, N.Y. COUNCIL 66 and ITS AFFILIATED	:	<u>CASE NO. U-5440</u>
LOCAL 515B - CITY OF NORTH TONAWANDA	:	
HOUSING AUTHORITY,	:	
Charging Party.	:	

SCHNELL & SALMON, ESQS. (RICHARD E. SCHNELL,  
ESQ., of Counsel), for Respondent

MICHAEL A. TREMONT, ESQ., for Charging Party

This matter comes to the Board on the exceptions of the City of North Tonawanda Housing Authority (Authority) to a hearing officer's decision that it discharged Robert Graap, an employee in the negotiating unit represented by AFSCME, N.Y. Council 66 and Its Affiliated Local 515B - City of North Tonawanda Housing Authority (AFSCME) in retaliation for the filing of a grievance.

On March 30, 1981, Graap filed a grievance in which he complained that Krause, the Authority's Executive Director, assigned him what he believed to be inappropriate work. Krause warned Graap that, if the grievance were not withdrawn, Graap might lose his job. Graap did not withdraw the grievance and it was subsequently rejected by Donovan, the Authority's Chairman. Thereafter, Graap filed a second and similar grievance. At a meeting called by Krause to discuss the second grievance, Krause asked Graap if he were

a veteran or a volunteer fireman, questions that were only relevant to the issue of whether Graap could be laid off without a hearing under the Civil Service Law. He also told Graap that he was reverting to probationary status "for slacking off on [the] job and poor performance". Krause had previously commended Graap for his job performance.

On April 30 Graap's second grievance was rejected by Donovan and on May 5 Krause wrote Graap that he had been terminated effective May 15. This precipitated the charge. At the hearing Krause testified that the decision to terminate Graap was made by the Board of Commissioners of the Authority only because of the financial savings involved and because Graap was the least senior employee in his occupation. The hearing officer concluded that the given reason was pretextual. He rejected the argument that the decision to terminate Graap was made by the Board of Commissioners for reasons unrelated to Graap's grievances. He ordered the Authority to reinstate Graap and make him whole.

Having reviewed the record,<sup>1/</sup> we affirm the decision of the hearing officer.<sup>1/</sup> It is based upon conclusions that flow logically from uncontested allegations of fact. The admitted irritation of the Executive Director at the grievances is attributable to the Authority,<sup>1/</sup> and the Authority's Chairman clearly

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<sup>1/</sup> In addition to its arguments on the merits, the Authority contends that the hearing officer erred in his conduct of the hearing in that he permitted charging party witnesses to testify about a statement made by Graf, a former commissioner, and that this Board is not empowered to order it to reinstate Graap. The admission of the testimony regarding the statements of Graf was not an error and, in any event, it did not prejudice the Authority. This Board's power to direct an employer to reinstate employees who are discharged in violation of the Taylor Law has been recognized by the Court of Appeals in several decisions including City of Albany v. Helsby, 29 NY2d 433 (1972), 5 PERB ¶7000; Board of Education, Grand Island v. Helsby, 32 NY 2d 660 (1973), 6 PERB ¶7004, affirming 37 AD 2d 493 (4th Dept., 1971), 4 PERB ¶7016.



had knowledge of those grievances. Furthermore, to the extent that the conclusions are based upon contested allegations, we find no basis for disturbing the hearing officer's resolution of the credibility issues in favor of AFSCME witnesses.

NOW, THEREFORE, WE ORDER the City of North Tonawanda Housing Authority;

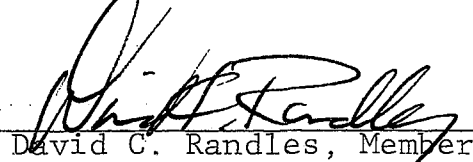
1. to cease and desist from interfering with, restraining or coercing public employees in the exercise of the rights guaranteed by §202 of the Act or discriminating against them for the purpose of encouraging or discouraging membership in, or participating in the activities of any employee organization;
2. to offer to restore Robert Graap to employment in his former position retroactive in all respects to the date of his termination and to make him whole for any loss of pay and benefits suffered by reason of his termination, from the date thereof to the date of offer of reinstatement, less any earnings derived from other employment obtained as a result of the layoff, with interest on this sum computed from the date of the layoff at the rate of 3% per annum; and

3. to post the notice attached at all places ordinarily used for communications to Authority employees.

DATED: May 10, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees that:

The City of North Tonawanda Housing Authority will not interfere with, restrain or coerce public employees in the exercise of the rights guaranteed by §202 of the Act or discriminate against them for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization.

The City of North Tonawanda Housing Authority will offer to restore Robert Graap to employment in his former position retroactive in all respects to the date of his termination and to make him whole for any loss of pay and benefits suffered by reason of his termination, from the date thereof to the date of offer of reinstatement, less any earnings derived from other employment obtained as a result of the layoff, with interest on this sum computed from the date of the layoff at the rate of 3% per annum.

City of North Tonawanda Housing Authority...

Dated .....

By .....  
(Representative) (Title)

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

7517

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2E-5/11/82
STATE OF NEW YORK, UNIFIED COURT SYSTEM,	:	
Employer,	:	
-and-	:	<u>BOARD DECISION</u>
FEDERATION OF COURT CLERKS, UNITED FEDERATION	:	<u>AND ORDER</u>
OF TEACHERS, LOCAL 2, NYSUT, AFT, AFL-CIO,	:	
Petitioner,	:	<u>CASE NO. C-2332</u>
-and-	:	
NEW YORK STATE COURT CLERKS ASSOCIATION,	:	
Intervenor.	:	

HOWARD A. RUBENSTEIN, ESQ. (NORMA  
MEACHAM, ESQ. and ANASTASIA ONORATA,  
ESQ., of Counsel), for Employer

JAMES R. SANDNER, ESQ. (PAUL H. JANIS, ESQ.  
and ROBERT J. WARNER, ESQ., of Counsel),  
for Petitioner

MURPHY, KOEHLER & DE YOUNG, ESQS. (STEVEN E.  
DE YOUNG, ESQ., of Counsel), for  
Intervenor

This matter comes to us on the exceptions of the Federation of Court Clerks, United Federation of Teachers, Local 2, NYSUT, AFT, AFL-CIO (UFT) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition to represent Court Clerks I, II, III and IV employed by the Unified Court System of the State of New York in New York City. The Director dismissed the petition without holding a hearing because there is no existing negotiating unit such as the one that UFT seeks to represent and Judiciary Law §39.7 prohibits this

Board from fragmenting the larger unit which now includes the four court clerk titles.

UFT does not, in its exceptions, argue that Court Clerks I, II, III and IV who work in New York City constitute a distinct negotiating unit or that they should be separated from the existing unit. Rather, it asserts that there are four distinct groups of employees within the existing unit, that the certification to represent the unit is held by four different employee organizations jointly, and that each employee organization services its own group of employees by representing those employees in grievances, legal actions and improper practice cases. It further asserts that each employee organization draws its members only from its own part of the unit and each sets its own dues structure.<sup>1/</sup>

On these assertions, UFT argues that we can process the petition and transfer to UFT the rights and responsibilities of representing Court Clerks I, II, III and IV which are now exercised by the New York State Court Clerks Association (Association).

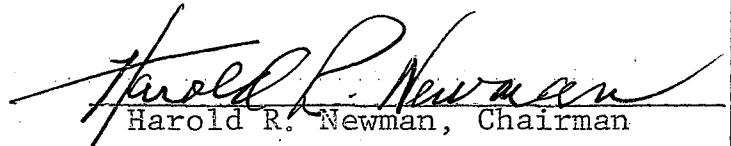
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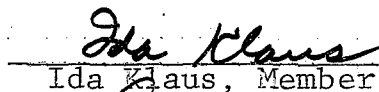
<sup>1/</sup> Prior to September 9, 1974, the court employees who form the existing unit were represented in four distinct units by four different unions that had been certified by New York City's Office of Collective Bargaining or its predecessor, the New York City Department of Labor. On January 21, 1974, the City of New York filed a petition with the Office of Collective Bargaining to consolidate the four units on the ground that the employees "share a community of interest in that they perform related work and have voluntarily initiated joint collective bargaining and fact finding" and the petition was granted in Decision 38-74. In Decision 45-74, the four previously certified organizations were jointly certified to represent the consolidated unit on September 9, 1974.

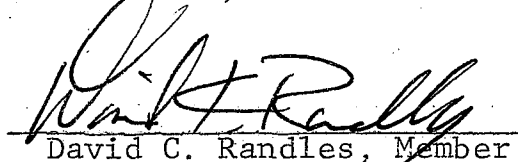
The contention that we can process a petition to challenge the status of the Association only must be rejected. Our responsibility under Section 207 of the Taylor Law is to ascertain the choice of employee organization of public employees in a defined negotiating unit and to certify the chosen organization to represent that unit. We may not certify an employee organization for a part of an existing negotiating unit.

NOW, THEREFORE, WE ORDER that the petition herein be, and it hereby is, DISMISSED:

DATED, Albany, New York  
May 11, 1982

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2F-5/11/82

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK,

Employer,

-and-

PUBLIC SERVICE PROFESSIONAL  
ASSOCIATION,

Petitioner,

-and-

LOCAL 300, SERVICE EMPLOYEES  
INTERNATIONAL UNION,

Intervenor.

BOARD DECISION AND ORDER

CASE NO. C-2368

COHEN, WEISS & SIMON, ESQS. (JAMES L. LINSEY,  
ESQ., of Counsel), for Petitioner

MARC Z. KRAMER, ESQ., for Employer

BIAGGI & EHRLICH, ESQS. (SOL BOGEN, ESQ., of  
Counsel), for Intervenor

On November 24, 1981, the Public Service Professional Association (Association) filed the petition herein for certification as the representative of an existing unit of employees of the Board of Education of the City School District of the City of New York. Local 300, Service Employees International Union (Local 300) now represents that unit, and it asserted that the petition should be dismissed because the Association is not an employee organization as that term is defined by the Taylor Law and is, therefore, ineligible for certification.<sup>1/</sup> The Association

<sup>1/</sup> Section 201.5 of the Taylor Law provides: "The term 'employee organization' means an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees."

was directed to submit an offer of proof that it is an employee organization and Local 300 was afforded an opportunity to respond and to submit an offer of proof that the Association is not an employee organization.

Upon receipt of those offers of proof, the Acting Director of Public Employment Practices and Representation (Acting Director) determined that the Association's allegations of fact indicated that it is an employee organization, that these facts were conceded by Local 300, and that none of Local 300's further allegations cast doubt on the Association's status as an employee organization. As there were no other issues of fact or law before him, he cancelled the scheduled hearing and ordered that there be an election in the undisputed existing unit.

The matter now comes to us on the exceptions of Local 300 in which it complains that it was denied a hearing and the opportunity to prove that the Association is not an employee organization. It argues that the Acting Director erred in denying it a hearing in that its offer of proof was not designed to show that the Association was not an employee organization but merely that it might not be an employee organization, there being a sufficient issue of fact to require a hearing. In support of this argument, it contends that some of the indicia of employee organization status relied upon by the Acting Director did not come into being until after the petition was filed. It also argues that the Association should not be deemed an employee organization because it is merely the alter ego of IBT, Local 832, which had been forced to



halt organizing activities in the instant unit by reason of a "no raiding" agreement between the Teamsters and SEIU.

Having reviewed the record and considered the parties' memoranda, we affirm the decision of the Acting Director. Local 300's offer of proof does not allege facts which might indicate that the Association is not an employee organization within the meaning of the Taylor Law, and the undisputed facts establish that it has the requisite indicia of employee organization status. Moreover, in State of New York, 1 PERB ¶399.85 (1968), affirming 1 PERB ¶424 (1968), we ruled that certain elements of employee organization status could be established after the completion of a representation proceeding.<sup>2/</sup>

Whether or not petitioner was created by IBT, Local 832, is irrelevant, given its status as an employee organization in its own right. There is no indication, either in the evidence or in Local 300's offer of proof, that, if certified, it would permit Local 832 to exercise its representation rights and responsibilities. Neither is it significant for this Board that the petition might constitute an evasion of a "no raiding" agreement. Such an agreement has no legal status in a proceeding before PERB. State of New York (PEF), 11 PERB ¶4030 (1978), aff'd 11 PERB ¶3047 (1978).


NOW, THEREFORE, WE ORDER that an election, by secret ballot, be held under the supervision of the Director

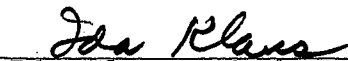
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<sup>2/</sup> See also Half Hollow Hills, 13 PERB ¶4050 (1980), aff'd 13 PERB ¶3104 (1980).

of Public Employment Practices and Representation among the employees of the employer in the stipulated unit who were employed on the payroll date immediately preceding the date of this decision, and that the employer submit to him, as well as to the Association and Local 300, within ten days from the date of receipt of this decision, an alphabetized list of all employees in the stipulated unit who were employed on the payroll date immediately preceding the date of this decision.

DATED: May 10, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2G-5/11/82

In the Matter of the  
ROME TEACHERS ASSOCIATION

BOARD DECISION

AND ORDER

Upon the Charge of Violation of  
Section 210.1 of the Civil Service Law.

CASE NO. D-0232

On March 10, 1982, Martin L. Barr, Counsel to this Board, filed a charge alleging that the Rome Teachers Association (Association) had violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a strike against the Rome City School District (District) on January 18, 19, 20, 21, 22, 25, 26 and 27, 1982. The charge further alleged that on each day of the strike approximately 75% of the teachers in a negotiating unit of 540 participated in the strike. This is the second instance involving a strike violation charged against the Association as representative of the teachers employed by the District (see 5 PERB ¶3052).

The Association filed an answer but thereafter agreed to withdraw it, thus admitting the factual allegations of the charge, upon the understanding that the charging party would recommend, and this Board would accept, a penalty of indefinite suspension of the Association's dues deduction privileges, commencing with the start of the 1982-83 school year, provided, however, that the

Association could apply to this Board on or after May 19, 1983 for restoration of such privileges.<sup>1/</sup> The charging party has so recommended.

On the basis of the unanswered charge, we find that the Association violated CSL §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one and will effectuate the policies of the Taylor Law.

NOW, THEREFORE, WE ORDER that the dues deduction privileges and agency shop fee deduction privileges, if any, of the Rome Teachers Association, be suspended indefinitely, commencing on September 1, 1982, provided that the Association may apply to this Board at any time on or after May 19, 1983 for the full restoration of such privileges. Such application shall be on notice to all interested parties and supported by proof of good faith compliance with subdivision one of CSL §210 since the violation herein found, such proof to include, for example, the successful negotiation, without violation of said subdivision, of a contract covering the employees in the unit affected by the

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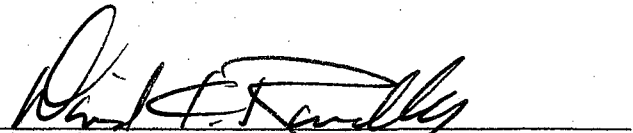
<sup>1/</sup> This is intended to be the equivalent of a right to apply for restoration after 90% of the Association's dues for the 1982-83 school year would have otherwise been deducted. It is understood that the District would have otherwise made 20 bi-weekly deductions, commencing September 23, 1982, and that 18 such deductions would have been made by May 19, 1983.

violation, and accompanied by an affirmation that the Association no longer asserts the right to strike against any government, as required by the provisions of CSL §210.3(g).

DATED: May 11, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2H-5/11/82

In the Matter of the Application of the

COUNTY OF WESTCHESTER

for a Determination pursuant to Section  
212 of the Civil Service Law.

BOARD DECISION

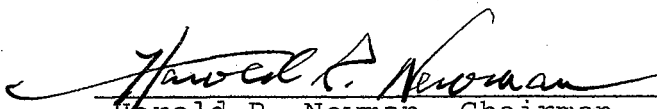
AND ORDER

DOCKET NO. S-0037


At a meeting of the Public Employment Relations Board held on the 11th day of May, 1982, and after consideration of the application of the County of Westchester made pursuant to Section 212 of the Civil Service Law for a determination that its Act No. 84-1967 as last amended by Act No. 28-1982 is substantially equivalent to the provisions and procedures set forth in Article 14 of the Civil Service Law with respect to the State and to the Rules of Procedure of the Public Employment Relations Board, it is

ORDERED, that said application be and the same hereby is approved upon the determination of the Board that the Act aforementioned, as amended, is substantially equivalent to the provisions and procedures set forth in Article 14 of the Civil Service Law with respect to the State and to the Rules of Procedure of the Public Employment Relations Board.

DATED: Albany, New York  
May 11, 1982

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

7528

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#21-5/11/82

In the Matter of

ULSTER COUNTY UNIT OF THE ULSTER  
COUNTY LOCAL 856, CIVIL SERVICE  
EMPLOYEES ASSOCIATION, INC.

BOARD DECISION AND ORDER

Upon the Charge of Violation of  
Section 210.1 of the Civil Service  
Law.

CASE NO. D-0220

ROEMER AND FEATHERSTONHAUGH, ESQS. (WILLIAM M.  
WALLENS, ESQ., of Counsel), for Respondent

MARTIN L. BARR, ESQ. (RICHARD A. CURRERI, ESQ.,  
of Counsel), for Charging Party

On May 9, 1981, Counsel to this Board filed a charge alleging that the Ulster County Unit of the Ulster County Local 856, Civil Service Employees Association, Inc. (CSEA), caused, instigated, encouraged, condoned and engaged in an eight-day strike against Ulster County (County) on October 1-8, 1980. The hearing officer determined that there was a strike. He further determined that there was no evidence that CSEA called or instigated the strike, but that after it had commenced, CSEA encouraged, participated in and condoned it. He further found that the strike had some actual impact and a severe potential impact upon the health, safety and welfare of the community.

FACTS

The County has approximately 1,800 employees in the CSEA unit and about 500 of them are CSEA members. The Unit has six sections, each with its own officers. They are: 1) Highway,

2) Infirmary, 3) Social Services, 4) County Complex, 5) College, and 6) Health Related Facility. Most of the CSEA support is in the Highway and Infirmary sections.

The prior collective bargaining agreement between CSEA and the County expired on December 31, 1979, and the County rejected a fact finder's report and recommendation concerning a successor agreement which had been issued September 22, 1980. The Highway Department employees started a meeting at 7:30 a.m. on Wednesday, October 1, and refused to work while the meeting was in progress. The meeting, which lasted eight days, was conducted by Clausi, the president of the Highway section. On each of the eight days, other than Saturday and Sunday when no work was scheduled, absenteeism increased 45 to 55 percent over normal rates.

More than half of the employees of the Infirmary Department joined the Highway Department meeting on the afternoon of October 1. They did not participate in the meeting on October 2, but did on its remaining six days. The absenteeism rate at the Infirmary on the seven days on which they participated in the meeting increased 27 to 51 percent over normal rates.

No officer of the Highway and Infirmary sections worked on any day when his section participated in the meeting. Neither did the CSEA stewards or the members of the CSEA negotiating team who normally worked in the two sections. Van Dyke, the Unit president, is the only unit officer who was assigned to one of the two sections and he did not work. He was fined for the days of his absence and did not appeal the fine. Nevertheless the



record is inconclusive as to whether he would have been expected to work but for the strike or whether he was on permanent full-time leave to work on CSEA business by reason of his union office.

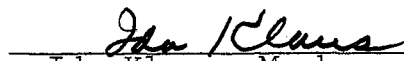
The eight-day meeting constituted a strike; it was a concerted refusal of County employees to perform their assigned tasks. CSEA contends, however, that the actions of the sections cannot be attributed to the Unit. This contention must be rejected. The record shows that the section presidents were all members of the executive committee of the Unit and that the CSEA shop steward in each section reports to the section president. This indicates that the sections have an official place in the structure of the Unit. CSEA also contends that Van Dyke made substantial efforts to persuade the employees of the two sections to return to work. The hearing officer concluded that his efforts were not sufficient to overcome the implications of Clausi's conduct of the meeting and the participation in it of all the section officers, shop stewards and negotiating team members. We affirm this conclusion. Moreover, the record evidence indicates that Van Dyke's efforts to terminate the strike consisted of pro forma statements designed to obscure CSEA's involvement in the strike rather than to actually persuade the striking employees to return to work. Accordingly, we determine that CSEA encouraged, condoned and engaged in a strike as charged. CSEA contends that if it is found to bear some responsibility for the strike, the duration of the dues check-off should be short because the impact of the strike was slight. According to CSEA, the fact that the patients at the Infirmary, the average age of whom was 82, were left without adequate nursing care and

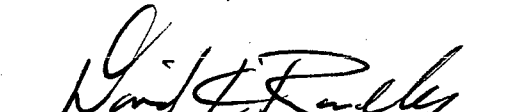
virtually no culinary service was irrelevant because no measurable harm resulted. This position is inconsistent with decisions of the Board holding that potential impact is a significant factor in determining strike penalties.<sup>1/</sup> We determine that CSEA should lose its dues deduction privileges for one year.

NOW, THEREFORE, WE ORDER that the dues deduction and agency shop fee privileges, if any, of the Ulster County Unit of the Ulster County Local 856, Civil Service Employees Association, Inc., be forfeited commencing on the first practicable date and continuing thereafter for a period of one year. Thereafter, no dues or agency shop fees shall be deducted on behalf of the employee organization until it affirms that it no longer asserts the right to strike against any government, as required by the provisions of CSL §210.3(g).

DATED: May 10, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

<sup>1/</sup> See, e.g. Local 1396, AFSCME, 4 PERB ¶3047 (1971); Local 1457, AFSCME, 5 PERB ¶3030 (1972); CSEA, 6 PERB ¶3002 (1973); Police Assn. of New Rochelle, 8 PERB ¶3007 (1975).